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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIN LEE COMEAU, Defendant and Appellant.	E063906 (Super.Ct.Nos. SICRF 14-56314, MBCRM 14-56865 & SICRF 13-55475) O P I N I O N

APPEAL from the Superior Court of Inyo County. Jerold Turner, Judge. (Retired judge of the Inyo Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr. and Randall D. Einhorn, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

An Inyo County jury found defendant and appellant Erin Lee Comeau guilty of two felony counts of possessing methamphetamine for sale (Health & Saf. Code, § 11378, counts 1 & 3), one count of misdemeanor child endangerment (Pen. Code, § 273a, subd. (b), count 5), and one count of misdemeanor possession of paraphernalia (Health & Saf. Code, § 11364.1, subd. (a)(1), count 6). The jury also found that defendant possessed methamphetamine for sale in count 3 while she was released on her own recognizance (the O.R. release enhancement). (Pen. Code, § 12022.1.)[1] The court suspended sentence and placed defendant on formal probation for 60 months, subject to terms and conditions, including that she serve 180 days in local custody.

On appeal, defendant claims insufficient evidence supports her misdemeanor child endangerment conviction in count 5 and her O.R. release enhancement in count 3. We find these claims lack merit and affirm the judgment.

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[1] All of the charges were filed in a consolidated information under case No. SICRF 14-56314, as the lead case, and case Nos. SICRF 13-55475 and MBCRM 14-56865. Counts 2 and 4, in which defendant was charged with simple possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), were treated as alternative charges to the possession-for-sale charges in counts 1 and 3. Hence, after the jury found defendant guilty as charged in counts 1 and 3, it did not reach a verdict in counts 2 and 4. The jury found defendant not guilty of possessing drug paraphernalia in count 7. (Pen. Code, § 11364.1, subd. (a)(1).)

II. FACTS

A. *Prosecution Evidence*

The People presented evidence that law enforcement officers searched defendant's home on February 15, 2013, February 19, 2014, and July 3, 2014. The evidence found during each search is detailed below.

1. The February 15, 2013, Search

On February 15, 2013, City of Bishop police officers served a search warrant on defendant at her home on Short Street in Bishop, California. She was alone in the home. The officers found eight individually wrapped bindles of a substance, which later tested positive as methamphetamine, in an eyeglass case in a child's board game box on the top shelf of defendant's bedroom closet. The eight bindles, including their packaging, weighed 9.5 grams. The same type of material used to package the eight bindles was found in a plastic container on defendant's bedroom nightstand. Similar packaging materials, a digital scale, and a measuring spoon were found in the drawer of a heater unit in the home.

Two of the officers who conducted the February 2013 search, City of Bishop Police Officers Brent Gillespie and Ronald Gladding, testified based on their training and experience that defendant possessed the eight bindles of methamphetamine for purposes of sale. An individual user would usually possess only one or two bindles, but 9.5 grams was enough to provide a user with 80 or more doses of the drug, and that quantity, along with the packaging materials, digital scale, and measuring spoon, indicated the drug was possessed for sale. Though no "pay-owe" sheets or large amounts of cash were found in

the home, it was not uncommon for such items not to be found along with drugs possessed for sale.

2. The February 19, 2014, Search

On February 19, 2014, law enforcement officers served a search warrant on defendant at her home on Brockman Street in Bishop, California. Defendant was alone in the home. She did not appear to be under the influence of methamphetamine.

In defendant's bedroom, a glass pipe used to smoke methamphetamine was found in a toothpaste carton on defendant's bed. White residue and a spoon used to melt methamphetamine were also found on the top of a large wooden dresser. After the clothing was removed from each of the five drawers of the wooden dresser, loose crystals later identified as methamphetamine were found in each drawer. The following amounts of methamphetamine were collected from each drawer: 0.02 grams, 0.16 grams, 0.08 grams, 0.03 grams, and 0.05 grams.

A small piece of methamphetamine was also found on a piece of plastic on the floor beneath the wooden dresser. A pink plastic children's cereal bowl, containing white residue, was found on the top of a smaller, plastic set of drawers in defendant's bedroom. Together, the loose material from the wooden dresser drawers and the white residue in the pink plastic children's cereal bowl weighed 0.42 grams. Also in defendant's bedroom, a black cutting board with white residue on it was found on the top of a television set, and a notebook containing nicknames and dollar amounts, which an officer opined was a pay-owe sheet used to track drug purchases and sales, was also found.

In a refrigerator-freezer in the kitchen, a larger quantity of methamphetamine was found inside a small white plastic container, covered by a "press and seal" lid, inside an ice cream carton that was one-third full of ice cream. The white container contained 12.86 grams of methamphetamine and was worth $400 to $600. A small digital "pocket" scale with white residue on it, and a larger "food weighing" scale were found in nearby laundry cabinets.

District Attorney Investigator Richard Beall, testifying as an expert on drug possession and sales, opined that, based on the pay-owe sheets, the packing material, and the digital scale found during the February 19, 2014, search of defendant's home, the 12.86 grams of methamphetamine in the ice cream container were possessed for sale, not for personal use. Methamphetamine sellers sell the drug to people outside or inside the seller's home, and typically do not prepackage methamphetamine for sale but weigh out, from a larger quantity of drug, the amount being bought and then package the weighed out drug. Methamphetamine is a corrosive material and can break down tooth enamel and bone. The officers used gloves when searching for methamphetamine in the home because methamphetamine can be absorbed through the skin.

Investigator Beall further testified that aside from defendant's bedroom, there were two other bedrooms in the Brockman Lane home, and it appeared that children lived in the home. The second bedroom contained a female child's clothing, the third bedroom contained a male child's clothing, and a cabinet in the hallway appeared to contain

children's school work. No methamphetamine was found in the second or third bedrooms where the children's clothing was found.

3. The July 3, 2014, Search

On July 3, 2014, Investigator Beall and other officers conducted another search of defendant's home on Brockman Lane. Defendant and two other adults were present in the home when the officers arrived. A methamphetamine pipe that had been used and a small digital scale with methamphetamine residue on it were found in defendant's bedroom. The pipe was in a laundry basket and the digital scale was in the pocket of a jacket in the closet. Defendant admitted that the digital scale was hers, but it was not seized because no usable quantity of methamphetamine was found in the home. Defendant was issued a citation for possessing the glass pipe and was not taken into custody, even though, on July 3, 2014, she was released on her own recognizance on a felony charge for possessing methamphetamine for sale.

4. Additional Prosecution Evidence

Defendant's son, C.M., who was 18 years old at the time of trial in March 2015, testified that he was living with his grandmother in February 2014 but visited defendant in her home during that time. According to C.M., defendant's younger son C., age 13 at the time of trial, lived with defendant in February 2014. Defendant's daughter B., age nine at the time of trial, lived with defendant "off and on" in February 2014; B. lived with defendant when she was not living with her father.

The court took judicial notice of an "O.R. agreement" signed by defendant on August 28, 2013, in case No. SICRF 13-55475, which was still in effect when her Brockton Lane home was searched on February 19, 2014.

B. *Defense Case*

Defendant did not testify and presented no affirmative evidence.

III. DISCUSSION

A. *Substantial Evidence Supports the Misdemeanor Child Endangerment Conviction*

Defendant claims that insufficient evidence supports her conviction in count 5 for misdemeanor child endangerment. (Pen. Code, § 273a, subd. (b).) She argues the evidence supporting the charge was weak, and the prosecution did not show she acted with criminal negligence. We disagree.

The applicable standard of review is familiar and well settled. In reviewing a claim that insufficient evidence supports a criminal conviction, we review the entire record in the light most favorable to the verdict to determine whether the record contains substantial evidence—evidence that is reasonable, credible and of solid value—from which a jury composed of rational persons could have found the essential elements of the crime true beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Penal Code section 273a criminalizes certain acts of child abuse, including endangering the health of a child. Child endangerment is a felony if committed "under

circumstances or conditions likely to produce great bodily harm or death"; otherwise, it is a misdemeanor. (Pen. Code, § 273a, subds. (a) [felony], (b) [misdemeanor].)

Misdemeanor child endangerment is committed by "[a]ny person who, under circumstances or conditions other than those likely to produce great bodily harm or death . . . having the care or custody of any child . . . willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered . . . ." (Pen. Code, § 273a, subd. (b).) Misdemeanor child endangerment has been called "cruelty to a child by endangering the health of the child" (*People v. Perez* (2008) 164 Cal.App.4th 1462, 1467) and requires proof of criminal negligence (*People v. Deskin* (1992) 10 Cal.App.4th 1397, 1402; see also *In re L.K.* (2011) 199 Cal.App.4th 1438, 1444-1446 [criminal negligence is the mens rea required for felony child endangerment]).

The jury was instructed pursuant to CALCRIM No. 823 that, in order to prove defendant guilty of the misdemeanor child endangerment charge, the People had to prove that defendant, "while having care or custody of a child, willfully caused or permitted the child to be placed in a situation where the child's person or health was endangered"; and that defendant "was criminally negligent when she caused or permitted the child to be endangered. [¶] Someone commits an act *willfully* when he or she does it willingly or on purpose. [¶] A *child* is any person under the age of 18 years."

Next, the court instructed that: "*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with *criminal negligence* when: [¶] 1. He or she acts in a reckless way that is a gross departure from the way an

ordinarily careful person would act in the same situation; [¶] 2. The person's acts amount to disregard for human life or indifference to the consequences of his or her acts; [¶] AND [¶] 3. A reasonable person would have known that acting in that way would naturally and probably result in harm to others." (CALCRIM No. 823.) This criminal negligence standard is the mens rea that applies to both misdemeanor and felony child endangerment. (See *People v. Deskin, supra,* 10 Cal.App.4th at p. 1402.)

In her closing statement to the jury, the prosecutor argued that the misdemeanor child endangerment charge was based on the evidence found during the February 2014 search of defendant's home. This included the 12.86 grams of methamphetamine found in the small white plastic container in the ice cream carton in the refrigerator-freezer, the methamphetamine crystals and residue found in defendant's bedroom, including the loose methamphetamine in defendant's dresser drawers, the white residue in the pink plastic children's cereal bowl, and the white residue on the cutting board on top of the television set.

The evidence also showed that methamphetamine is a corrosive material that can break down tooth enamel and bone and be absorbed through the skin. At the time of the February 19, 2014, search, defendant's two younger children, B. and C., were around eight and 12 years old; C. lived with defendant; and B. had a room in defendant's home and lived with her "off and on." During the February 19, 2014, search, Investigator Beall observed that, aside from defendant's bedroom, two other bedrooms in the home appeared to be occupied by children, one male child and one female child.

Based on the entire record, the jury could have reasonably inferred that B. and C. were present in the home during the hours preceding the February 19, 2014, search, and could have easily accessed the methamphetamine in the ice cream carton and in defendant's bedroom. Indeed, the evidence strongly supports the jury's determination that defendant acted with criminal negligence and committed misdemeanor child endangerment by having substantial quantities of methamphetamine in her home in areas readily accessible to B. and C., her eight- and 12-year-old children. Photographs taken of the methamphetamine found during the search showed that a typical eight-year-old or 12-year-old child could have easily reached, touched, and ingested the methamphetamine found in the ice cream carton and in defendant's bedroom. No evidence was presented that defendant's bedroom door or the refrigerator-freezer were locked at any time before the search.

In sum, substantial evidence shows defendant was criminally negligent and willfully endangered the health of B. and C. by keeping substantial quantities of methamphetamine in her home in at least two areas readily accessible to B. and C.—in her bedroom and in the small white plastic container in the ice cream carton in the refrigerator-freezer. (Pen. Code, § 273a, subd. (b).) Her criminal negligence "amounted to a reckless, gross or culpable departure from the ordinary standard of due care"; it was """such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life . . . or an indifference to consequences."""" (*People v. Valdez* (2002) 27

Cal.4th 778, 788; *People v. Deskin*, *supra*, 10 Cal.App.4th at p. 1402.) Indeed, children are known to like ice cream, and an ordinarily prudent person would have known that B. and C. could have easily confused the methamphetamine in the white plastic container in the ice cream carton with "sprinkles" to be put on the ice cream.

In arguing that insufficient evidence shows she acted with criminal negligence, defendant emphasizes she did not appear to be under the influence of methamphetamine during the February 19, 2014, search of her home; B. and C. were "school age children"; they were not infants, and they were not present during the search; the officers left the ice cream in the freezer after removing the small white plastic container with the 12.86 grams of methamphetamine; the small white plastic container was "sealed"; and there was no evidence that defendant was manufacturing or selling methamphetamine in her home. None of these facts undermine the substantial evidence that defendant acted with criminal negligence and willfully endangered the health of her children by keeping substantial quantities of methamphetamine in her home in places readily accessible to the children.

Defendant claims her conduct was less egregious than the criminal negligence involved in two other misdemeanor child endangerment cases. We are not persuaded. In *People v. Little* (2004) 115 Cal.App.4th 766, the defendant's misdemeanor child endangerment conviction was upheld based on evidence that the defendant left his six- to 12-month-old daughter lying unrestrained on a three-foot-high bed. The infant's age showed she was old enough to crawl or at least roll over, and could have been injured by

falling off the bed. (*Id*. at pp. 770-772.) Further, the home was so unsanitary that it posed a potential danger to the health of the infant. The home smelled of rotten food and feces, there were piles of garbage in almost every room, "[a]nimals were running around," and there were "cockroaches everywhere." (*Id*. at pp. 770, 772.)

In *People v. Perez, supra,* 164 Cal.App.4th 1462, the defendant's misdemeanor conviction for endangering the health of a four-year-old child was affirmed based on evidence that he left plastic bindles of heroin and a syringe full of liquid in an unlocked drawer inside a two-foot-high table in the entry room of the residence, and left an uncapped, full syringe on the top of an end table. (*Id*. at p. 1473.) The child had to pass through the entryway in order to get to her bedroom. Heroin was also found in plain view in the defendant's bedroom, on a dresser that was about four feet tall. The child had gone into the defendant's room to see his bird. (*Id*. at pp. 1472-1474.) The defendant did not deny that the drugs and drug paraphernalia belonged to him, or that he had left the items around the home knowing there were children in the home. (*Id*. at p. 1474.)

Little and *Perez* do not assist defendant's argument. "[Penal Code] [s]ection 273a holds every person to an objective standard of reasonableness regarding the . . . endangering of a child's person or health. A finding of criminal negligence is made by applying an objective test of whether a reasonable person in the defendant's position would have been aware of the risk involved." (*People v. Deskin, supra,* 10 Cal.App.4th at p. 1403.) Here, substantial evidence shows that a reasonable person in defendant's

position would have known that keeping methamphetamine in an ice cream carton and in defendant's bedroom, areas readily accessible to B. and C., endangered their health.

Lastly, defendant argues "[t]he prosecution's case was so weak the magistrate judge discharged the child endangerment charge at the end of the preliminary hearing." The record shows the child endangerment charge was originally filed as count 3 of a complaint filed on February 25, 2014, in case No. MBCRF 14-56314, and that count 3 was dismissed following a May 8, 2014, preliminary hearing. The charge was refiled as count 5 of the consolidated information filed on March 9, 2015, in case Nos. SICRF 13-55475, SICRF 14-56314, and MBCRM 14-56865. The record does not indicate that defendant moved to set aside count 5 of the consolidated information. (Pen. Code, § 995, subd. (a)(2)(A) [information may be set aside on the defendant's motion on the ground the defendant was not legally committed by a magistrate before the information was filed].) A Penal Code section 995 motion is the exclusive method for challenging the legality of a commitment, and the failure to make such a motion waives or forfeits any claim that the evidence at the preliminary hearing was insufficient to support the charge. (Pen. Code, § 996; *In re Berry* (1955) 43 Cal.2d 838, 844.) Thus, by failing to move to set aside count 5 of the consolidated information, defendant forfeited any objection to the sufficiency of the evidence presented at the preliminary hearing to support the charge.

B. *Substantial Evidence Supports the O.R. Release Enhancement on Count 3*

Defendant also claims insufficient evidence supports the jury's true finding on the sentencing enhancement alleged in count 3, namely, that defendant possessed methamphetamine for sale as charged in count 3 in February 2014 while she was released on her own recognizance in another case. (Pen. Code, § 12022.1.) We conclude substantial evidence supports the true finding on the enhancement.

At the close of the evidence and in the presence of the jury, the prosecutor asked the court to take judicial notice of an "O.R. agreement" or "own recognizance agreement" signed by defendant on August 28, 2013. The prosecutor said, "I do have a request that the Court take judicial notice of the O.R. agreement signed by the defendant in SIC[RF] 13-55475, and I believe that agreement was signed on August 28th of 2013, by the defendant and it was still in effect on February 19, 2014, when the search warrant was served . . . regarding the possession for sale" charge in count 3.

Defense counsel stated he had no objection to the court taking judicial notice of the O.R. release agreement. The court granted the request and admitted the O.R. release agreement into evidence as the court's exhibit 1. By signing the O.R. release agreement, defendant agreed she would violate no laws in exchange for being released on her own recognizance in case No. "MBCRF-13-55475." (Italics added.)

Penal Code section 12022.1, subdivision (b), provides that "[a]ny person arrested for a secondary offense that was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of

an additional two years . . . ." A primary offense means "a felony offense for which a person has been released from custody on bail or on his or her own recognizance prior to the judgment becoming final . . . ." (Pen. Code, § 12022.1, subd. (a)(1).) A secondary offense means "a felony offense alleged to have been committed while the person is released from custody for a primary offense." (Pen. Code, § 12022.1, subd. (a)(2).)

The jury was instructed that: "If you find the defendant guilty of the crime charged in count 3 of the consolidated information, you must also decide whether the People have proved the additional allegation that the defendant was released on her own recognizance at the time she committed the crime. To find the allegation true, you must find the following: [¶] 1. When the defendant possessed methamphetamine for sale, she was released on her own recognizance." The jury's special verdict form on the enhancement states that the jury found defendant was "on her own recognizance in Inyo Superior Court case SICRF-13-55475 at the time she committed the crime alleged in count three of the consolidated information."

Defendant argues that the O.R. release agreement is insufficient to support the jury's true finding on the O.R. release enhancement because it "did not state that [defendant] was still on her own recognizance on February 19, 2014 when the second search occurred." We are not persuaded. Defendant correctly points out that the prosecutor's statement that the O.R. release agreement was in effect on February 19, 2014, was not evidence. (CALCRIM No. 222 ["Nothing that the attorneys say is evidence"]; Evid. Code, § 140 [defining evidence as testimony and other things offered to prove the existence or nonexistence of a fact].) But

the jury was properly instructed that nothing the attorneys said was evidence. And, based on the O.R. release agreement and the other evidence presented at trial, the jury could have reasonably inferred that, when defendant possessed methamphetamine for sale as charged in count 3 of the consolidated information on February 19, 2014, she was released on her own recognizance in the felony case in which she was charged with possessing methamphetamine for sale on February 15, 2013. The O.R. release agreement did not have an expiration date and was filed less than six months before February 19, 2014, the date the evidence showed defendant possessed methamphetamine for sale as charged in count 3.

Defendant further argues that the O.R. release agreement was insufficient to support the O.R. release enhancement because it expressly indicated that defendant was released on her own recognizance in case No. "MBCRF 13-55475," while the jury's special verdict form states she was released on her own recognizance in case No. "SICRF-13-55475." This discrepancy in the two case numbers does not undermine the sufficiency of the evidence supporting the enhancement.

Case No. MBCRF 13-55475, which appears on the O.R. release agreement, is the case in which defendant was originally charged, on August 1, 2013, with possessing methamphetamine for sale on February 15, 2013. On February 21, 2014, additional charges were filed in case No. MBCRF 14-56314, based on the evidence found during the February 19, 2014, search of defendant's home. Then, on July 14, 2014, a misdemeanor complaint was filed in case No. MBCRM 14-56865, charging defendant with misdemeanor possession of paraphernalia on July 3, 2014, based on the paraphernalia found in defendant's home on

that date. By the time the consolidated information was filed on March 9, 2015, case Nos. MBCRF 13-55475 and MBCRF 14-56314 had ostensibly been changed to case Nos. SICRF 13-55475 and SICRF 14-56314. Only the prefixes of the case numbers were changed. Thus, we do not believe the jury was confused by the "MBCRF" case number prefix appearing on the O.R. release agreement, and the "SICRF" case number prefix appearing on the special verdict form.

IV. DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.